IN THE SUPREME COURT OF FLORIDA

MARC CHRISTMAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 79044

On appeal from the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida

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REPLY BRIEF OF APPELLANT

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ISSUE I:

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS ALLEGEDLY MADE TO BAILIFFS WHILE IN CUSTODY

In addressing the question of whether Christmas' statements to bailiffs in the holding cell should be suppressed, the state argues that there was a complete absence of coercion or compulsion, and that Christmas was not interrogated in any manner. The state relies on Illinois v. Perkins, 396 U.S. 292, 110 S.Ct. 2394, 110 L. Ed.2 243 (1990), for the proposition that because Christmas "spoke at his own peril," the statements were admissible. Perkins is distinguishable because it involved an undercover operative placed in a jail cell -- not uniformed employees of the sheriff's office. Just as the Supreme Court stated in Perkins, Miranda warnings are required to preserve the defendant's rights in a "police dominated atmosphere." Clearly, Marc Christmas was in such an atmosphere in the custody of the sheriff's office in a locked holding cell behind the courtroom. Miranda was required; the trial court erred in denying the motion to suppress.

ARGUMENT

ISSUE II:

THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE AND IN SENTENCING CHRISTMAS TO DEATH

The state contends that the jury recommendation of life imprisonment over death in this case remains unreasonable, and cites several cases for the proposition that the mitigating evidence presented by Marc Christmas to the advisory jury "pales in significance" when weighed against the strong aggravation. Christmas would point out that at the advisory hearing, the state presented no testimony, simply arguing the testimony previously presented at trial (T-1295-1480); moreover, the cases relied upon by the state can be distinguished.

In Marshall v. State, 604 So.2d 799 (Fla. 1992), unlike the instant case, the defense presented no testimony at the advisory sentencing hearing. Additionally, in Marshall, this court found defense counsel's "argument composed largely of a negative characterization of the victim." Marshall is, therefore, completely distinguishable from the instant case.

Similarly, Robinson v. State, __So.2d__ (Fla. 1992), 17 FLW S 635 (Oct. 15, 1992), is distinguishable. In Robinson this court specifically noted that the trial court had found in mitigation only that Robinson had maintained close family ties and that Robinson had been supportive of his mother. This court adopted the trial court's specific finding that the "victim's background cannot be used to mitigate the sentence to be imposed and warranted under

these facts." Robinson is distinguishable not only because of the lack of mitigation presented, but also because of severity of the facts.[1] 17 FLW F at 636 (emphasis supplied).

The state also cites State v. Dixon, 283 So.2d 1 (Fla. 1973), for the proposition that the trifurcated capital sentencing structure is advantageous because the judge is the actual sentence, and because sentence is imposed "in light of judicial experience," as opposed to mere product of "un-channelled emotion." (Appellee's brief at 52). The record in this case clearly reflects that defense counsel presented no "un-channelled emotion" to the advisory sentencing jury. The testimony lasted less than a day; appellant presented a succession of well-established, employed, educated witnesses who presented only rational, well-organized testimony -- and no emotional appeal -- to the jury. (T-1295-1480).

The state also argues that because the judge "knows the law," he--rather than the jury--was able to afford the testimony the weight "which it deserved." Clearly, this argument is undercut by the fact that the jury was properly instructed on the law both before and after testimony was presented at the advisory sentencing hearing. (T-1481-T-1548-57). The jury was fully instructed on ***all*** of the law applicable to its decision-making; no other law was necessary to be instructed. As appellant pointed out in his

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[1]The severity of the facts of Robinson is set out in the case of the co-defendant, Ronald Lee Williams. In Williams v. State, 18 F.L.W. S. 260, __ So.2d __ (Fla. 1993), this court reviewed the facts: four murders, two rapes, stabbings and systematic killings committed by Williams' lieutenants in his drug-dealing ring.

initial brief, the trial court had noted its confidence in the jury:

> Mr. Chipperfield, I'm convinced I have a little more confidence in the people that hear the case, assuming we get to the penalty phase part of it that they will follow the law as I instruct them and wouldn't that be an aggravating factor and prohibiting the State from arguing about his record? I have more faith in jurors and that they will follow the law and the argument of counsel. I will deny that motion.

(T-278-79).

The state cites several additional cases in which this court has affirmed the trial court's override of a life recommendation by the jury. Robinson, supra, has been previously distinguished. Coleman v. State, 18 FLW S 28 (Fla. Dec. 24, 1992) (a companion case to Robinson), is similarly distinguishable because the only mitigation the trial court found had been established was that Coleman had "close family ties and supported his mother." 18 FLW at S29-S30. This court specifically noted that Coleman's additional potential mitigating evidence was of "little weight," and "provided no basis for the jury's recommendation." 18 FLW at S30.

In Ziegler vs. State, 580 So.2d 127 (Fla. 1991), this court affirmed the four aggravating factors found by the trial judge, and, in addition, determined that the aggravating factor of "cold, calculated, and premeditated" could have been applied to Ziegler. 580 So.2d at 130. In affirming the trial court's rejection of the non-statutory mitigating evidence, this court noted "[the] judge could properly consider the witnesses' relationships to the

defendants and their personal knowledge of his actions in deciding what weight to give to their testimony", 580 So.2d at 130. In Marc Christmas's case, independent professional and lay witnesses presented the bulk of the testimony: counselors, teachers, employers and correctional officers.

Ziegler is thus distinguishable from the instant case, where both professional and non-lay professional witnesses testified as to Marc Christmas' dependent personality, and to the fact that he was a follower rather than a leader, capable of good deeds, kind acts, considerate behavior, and good work. In Ziegler, the trial court specifically summarized the reasons for giving the defendant's mitigating evidence little or no weight. 580 So.2d at 131. This court specifically found that "the evidence of mitigation is miniscule in comparison with the enormity of the crimes committed." Id. Noting that Ziegler "not only murdered his own wife in order to obtain insurance proceeds on her life but also murdered three other people in an elaborate plan to cover up his guilt," this court held that no reasonable person could differ in the appropriateness of the death sentence. 580 So.2d at 131.

Ziegler is clearly distinguishable from the instant case. In Ziegler, the homicides were the results of lengthy prior planning, and the defendant lured his spouse and her parents to the site of their deaths, and killed them for pecuniary gain. The facts of Ziegler are so different from this case, that it is clear that Ziegler does not apply.

Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988), is also

distinguishable. This court stated in Torres-Arboledo

> It is apparent from the record that Torres-Arboledo's intelligence and potential for rehabilitation were the sole factors upon which the jury could have relied in making its recommendation.

524 So.2d at 413. Clearly, in Marc Christmas' case, much more than this type of minimal mitigating evidence was presented. Marc Christmas called fifteen witnesses in his behalf, including three family members, several lay witnesses, and expert witnesses, to establish mitigation. This case is clearly distinguishable from Torres-Arboledo, and this court should reject Torres-Arboledo as authority to affirm the override.

White vs. State, 403 So.2d 331 (Fla. 1981), is also totally distinguishable from the instant case. In White, the trial court found five aggravating circumstances, and no mitigating circumstances other than the non-statutory consideration that the defendant was not the trigger man. This court stated

> We do not believe, however, that this factor alone outweighs the enormity of the aggravating facts. . . .

403 So.2d at 340. Moreover, the trial court had also found that the defense counsel's vivid description to the jury on the effects of being electrocuted was calculated to influence a life sentence through emotional appeal. 403 So.2d at 340. No such "calculated" emotional appeal is established by the record in this case.

Quite to the contrary, the record in the instant case reflects a methodical and professional presentation of family, friends, employers, expert witnesses, and correctional officers who clearly

established that the life recommendation was appropriate given the record in this case, and that the jury recommendation of life was reasonable under Tedder, supra. Tedder requires that if there exists a reasonable basis for the jury recommendation of life, then it must be given effect.

Engle v. State, 510 So.2d 881 (Fla. 1987), is also distinguishable. In Engle, the state proved aggravating circumstances to the judge at the sentencing hearing that had never been presented to the advisory jury. Moreover, the trial court found no mitigating circumstances at all. Engle's only contention to the trial court was that the "jury recommendation was plausible because there was no direct evidence that [he], rather than [the co-defendant], actually did the killing.[2] 510 So.2d at 883. This court affirmed the trial court's override of the jury recommendation of life, finding there was not a reasonable basis for the recommendation. In the instant case, there was clearly a reasonable basis for the jury recommendation; this court should so hold and reverse the trial court override.

The state urges that the cases urged by Christmas in his initial brief are distinguishable and submits that the evidence of mitigation presented in those cases was "much more substantial" than that presented by Christmas. Such argument misses wholly the doctrine of Tedder and its progeny. The question for this court is whether the evidence presented to the advisory panel in this

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[2] The co-defendant of Engle received a life sentence upon re-sentencing.

case provided a reasonable basis for the jury recommendation, and whether any reasonable person could differ from that recommendation. Tedder v. State, 322 So.2d 908 (Fla. 1975).

The state addressed each mitigating factor presented by Marc Christmas. The state first urges that the trial court was correct in holding that Christmas' age of twenty-one was not mitigating, given the fact that Christmas had left home at seventeen, lived on his own for four years, and had served time in prison. (Answer brief of appellee at 54). The cases upon which the state relies to support its contention in fact support appellant's position. In Eutzy v. State, 458 So.2d 755 (Fla. 1984), this court stated

> [Age] is a mitigating circumstance when it is relevant to the defendant's mental and emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences flowing from them.

458 So.2d at 759. In the instant case it was clearly established that Christmas' emotional maturity was significantly less than his chronological age of twenty-one, that Christmas was a dependent personality, a follower rather than a leader, and a veteran of emotionally-handicapped classes in public school (T-1295-1480; T-1335). Clearly, Christmas' age is relevant to his mental and emotional maturity, and to his ability to take responsibility for his own acts. The jury could have reasonably considered all of these factors in reaching its recommendation of life.

The state additionally seems to take the position that Christmas' age, coupled with "a significant history of prior criminal activity" somehow should result in a recommendation for

death. (Brief of appellee at 57). "Significant history of criminal activity" is clearly **not** a statutory aggravating factor; the state's argument as to this issue is unfounded and specious. Notwithstanding that, the state argues that because the jury knew of Christmas' significant criminal activity, that his age should not be considered to be mitigation. (Brief of appellee at 57). The state's argument is fallacious, in that it wholly ignores the fact that the jury was fully aware of Christmas' prior criminal record (through cross-examination of his father) and ***still*** recommended the life sentence. Moreover, some of the offenses relied on by the trial court occurred before Christmas had reached the age of eighteen.

The state next addresses the testimony of Dr. Prewitt concerning Christmas' "dependent personality syndrome." The state argues that Dr. Prewitt's testimony is "largely psychobabble" (brief of appellee at 62), and that the trial court's rejection of it was not error. The state would have this court hold that because Dr. Prewitt did not discuss statutory mitigating factors, but rather dealt with non-statutory mitigation, that his credibility and professionalism was in question and that his testimony should be disregarded. This argument is, too, fallacious; appellant Christmas urged Dr. Prewitt's testimony in support of his contention that *non-statutory* mitigating factors existed.

The state, in urging this court to reject Dr. Prewitt's testimony, compares Thompson v. State, 553 So.2d 153 (Fla. 1989);

however Thompson is totally distinguishable. The Thompson trial court wrote a lengthy analysis of the psychiatrist's testimony; it is clear from the record in Thompson that the psychiatrist contradicted himself, performed only a very minimal evaluation to determine the existence of an *organic* brain syndrome, and was possibly incompetent. In the instant case, the testimony of Dr. Prewitt was not impeached, he did not attempt to make any ***medical*** or ***organic*** findings and he spent a significantly greater amount of time with his patient. Because the psychiatrist's entire testimony and total credibility was impeached in Thompson, this court held that the evidence supported the trial court's "reasoned analysis" rejecting statutory mitigation [of substantial impairment to appreciate criminality of conduct or to conform conduct to requirements of law]. 553 So.2d at 156-57. Clearly, Thompson is totally distinguishable and cannot be compared with the instant case.

The state further attacks the testimony of Christmas' mental health counselor, his high school teacher and his counselor. Appellee states that to reply on the testimony of those witnesses would "be insulting to those defendants with genuine intellectual deficits and/or mental retardation." (Brief of appellee at 63). Rather than restate the summary of the testimony here, appellant refers this Court to Argument II of his initial brief. The mitigation presented on his behalf by witnesses Lowery, Moerings, and Nazworth is summarized therein. When the personality disorder described by the professional witnesses, school counselors and

teachers is taken in context along with Christmas' childhood/family disorders and passive/dependent personality it is clear that it was reasonable for the advisory jury to recommend a sentence of life. This court should reverse the court override of the jury recommendation because there is a reasonable basis in fact for the jury's conclusion.

The state additionally argues that to rely on Christmas' dysfunctional family relationships during his childhood would "do a great disservice to those defendants who have suffered through mental or physical abuse in their lives". (Brief of appellee at 65). Again, this argument is specious, and has no merit in this court's consideration of the reasonableness of the jury's recommendation under the doctrine enunciated in Tedder. Oddly enough, the state, while stating that Christmas' situation is hardly "unique," relies on several cases involving less than unique facts for the proposition that other defendants seem to have more seriously dysfunctional childhoods.(Brief of appellee at 65 citing Scott v. State, 603 So.2d 1265 [Fla. 1992], Buford v. State, 570 So.2d 923 [Fla. 1990], and Holsworth v. State, 552 So.2d 348 [Fla. 1988]).

The state also attempts to attack Christmas' contention that he was more of a follower than a leader by discrediting the sources of the testimony. The state characterizes the testimony as that of "lay persons." This argument ignores the fact that mental health professionals, teachers, trained correctional officers, and work release leaders testified on Christmas' behalf (T-1295-1480). The

jury could have reasonably relied on their testimony in reaching its conclusion to recommend life.

Moreover, the state asserts that the testimony of Christmas' roommate was uncontradicted, and established that the robbery of the Pizza Hut had been planned. The record is replete with instances of impeachment of this witness, Kyle White; the jury may have chosen not to believe his testimony. (T-892-1036). If so, the jury was entitled to reject all or part of his testimony; it would have been reasonable for it to do so in the fact of the cross-examination of Kyle White.

The state attempts to rebut appellant's reliance upon Barclay v. State, 470 So.2d 691 (Fla. 1985), and Dolinsky v. State, 576 So.2d 271 (Fla. 1991), by stating

> As noted, the jury in this case heard no evidence which could lead to the reasonable conclusion that Stein was more culpable.
>
> * * *
>
> The jury in this case heard no such similar information and could not reasonably base its recommendation of life upon any belief that any co-defendant, of equal or greater culpability, had received a lesser sentence. As such, this case is clearly distinguishable from a number of cases like Barclay and Dolinsky, in which this court has reversed the sentence of death, based upon a finding that the jury's distinction between co-defendants is reasonable.

(Brief of appellee at 68)(footnote omitted). This argument overlooks the fact that the ***state*** presented the sole evidence in Christmas' trial on the issue of relative culpability: the testimony of the two bailiffs, Jeffrey Carroll and Vincent Hall.

(T-1154-1171). Clearly, based upon evidence presented by the state during its case in chief, the jury could have reasonably concluded that Marc Christmas was the least culpable of the two co-defendants and could have lawfully based its recommendation of life solely on this conclusion. This basis for recommendation of life has been held to be reasonable, and thus survives a court override. Appellant relies on the argument as to Dolinsky, supra, and Barclay, supra, presented in his initial brief. The cases relied by the state in its answer brief support appellants' contention that a jury override is improper where the jury could have reasonably found the defendant to be the least culpable, and support appellants' argument.

Moreover, the state argues cases which are inapplicable here: the cases cited by the state at pages 68-69 of its reply brief are cases in which the ***jury actually learned*** of the sentence imposed on the co-defendant--unlike the instant case. In the instant case, the jury heard the complete conduct of both Christmas and Stein; the jury has the right to consider all of the evidence and to reach the conclusion that Christmas was the least culpable of the two. Appellant does not rely on disparate sentences of the two co-defendants in support of his contention that the jury recommendation was reasonable in the instant case, and this court should disregard any such argument by the state.

The state portrays the trial court has having overridden the jury recommendation of life "out of a justified desire for equal justice." (Answer Brief of Appellee at 76). The state's summary

wholly misses the point. "Equal justice" means that in every capital case, the sentencing court will consider the offense, the facts, and the offender him/herself. It does *not* mean that only the offense is considered and that if two co-defendants are equally involved, that they must be given the same penalty. The keystone requirement is that the death penalty only survives constitutional muster if it is applied on a case-by-case basis, with regard to the specific facts and circumstances of ***each*** case, and as well with regard to the various factors regarding each particular defendant. In the case of Marc Christmas, after learning every single fact known about the offense, and as well every facet of Marc Christmas' being, the jury saw that a reasonable basis existed for a recommendation of life; it was error for the trial court to override that recommendation.

The state also seems to argue at page 77 of its Answer Brief that because Christmas did not present statutory mitigating evidence, that the jury recommendation of life was unreasonable. The law is clear that non-statutory mitigating evidence is a sufficient basis for a jury recommendation of life. Moreover, the state would have this court believe that because Christmas "expressed absolutely no remorse" for his involvement in the homicide, that this factor should be considered as an aggravator. Clearly, the death penalty statute does not set forth lack of remorse as an aggravating factor. Notwithstanding that, Christmas' statement to the bailiff, which the state characterized as a "confession" was replete with evidence of remorse and sadness:

Christmas stated "I'm no good"; and "I'm just a guilty as Stein is." (T-1162; T-1171). The state would lead this court to believe that Christmas' statements to the bailiff were "boasting". The record does not support such a categorization, and this court should reject the state's contention that it does.

Finally, the state argues that the jury recommendation of life in prison for Marc Christmas was essentially based upon "sympathy." (Answer Brief of Appellee at 78). The record establishes no proof whatsoever of this basis, and the trial court did not in any way base his override of the life recommendation on this theory. The trial court never indicated that the jury was overcome or influenced in any way by sympathy; it is preposterous that the state should make such a suggestion when the record wholly fails to support such a contention.

Because the advisory sentencing jury had before it a number of uncontroverted and strong witnesses to establish that Marc Christmas should receive the life sentence, the recommendation was not unreasonable, and should be affirmed. The trial court erred in overriding the recommendation of life.

At pages 87 and 88 of its brief, appellee notes:

> "Although Appellant has not specifically raised this issue, the State would briefly address the issue of proportionality."

Appellee did not raise the issue because it has nothing to do with the reasonableness of the jury recommendation. This court's review under Tedder must precede any proportionality review, and it is appellant's position that a proper Tedder analysis will result in

a life sentence, thus precluding any proportionality review. A proper Tedder analysis looks at the facts of **this** case and the mitigation evidence presented on behalf of Marc Christmas to find a reasonable basis for the jury recommendation of life. It does not look outside the evidence presented to the jury to the facts of other cases. The fact that in similar cases others have gotten death does not provide a reason to reject a jury recommendation of life in this case.

Appellee cites Cook v. State, 581 So.2d 141 (Fla. 1991), Jones v. State, 411 So.2d 165 (Fla. 1982), and Meeks v. State, 339 So.2d 186 (Fla. 1976), in support of its declaration that a death sentence for Marc Christmas would be proportionate. However, in all three of those cases the jury ***recommended*** death and no Tedder analysis was involved. The cases relied upon by the state are inapplicable here.

In footnote 16, appellee argues that a death sentence for Marc Christmas is proportionate with the death sentence imposed on the co-defendant Steven Stein because there is little or no difference in the "findings in ***aggravation.***" Aside from the fact that appellee has gone outside the instant record to make this argument, appellee has also failed to compare the ***mitigation*** presented for the two men. Under the law, the jury must consider both, and Marc Christmas' jury, having done that, reasonable decided that a life sentence was appropriate.

ARGUMENT

ISSUE III:

WHETHER THE TRIAL COURT ERRED IN IMPOSING CHRISTMAS' TWO DEATH SENTENCES

A. The court improperly found that the homicides were committed in an especially heinous, atrocious or cruel manner.

The State urges that the trial court's sentencing order finds the "heinous, atrocious or cruel" aggravating circumstance only for the homicide of Dennis Saunders. (Answer Brief of Appellee at 80). The record clearly fails to substantiate such a conclusion, because both Dennis Saunders and Bobby Hood are referred to in Judge Wiggins' order addressing this particular aggravating circumstance. (R-___ - _____). The trial court found that this factor applied to both homicides. (R-___- ___).

The state takes the position that mental anguish over knowledge of impending death is sufficient to establish the HAC circumstance, but the cases upon which the state relies are distinguishable. In Garcia v. State, 492 So.2d. 360 (Fla. 1986), the first victim was threatened with death, then shot in the presence of the others after refusing to produce money. A second victim, who was also threatened, was then shot after refusing to give money. In Garcia, a significant amount of time passed between the killings. In Steinhorst v. State, 412 So.2d. 332 (Fla. 1982), after the first victim was shot, the three other victims were bound, gagged, blindfolded and transported to another area where each was then shot. Additionally, more time passed than in the instant case. In Henderson v. State, 463 So.2d. 196 (Fla. 1985),

three victims were first bound and gagged before each was shot one at a time in the presence of the others. In Francois v. State, 407 So.2d. 85 (Fla. 1981), *eight* victims were shot one at a time after the defendant had announced that all of them would be killed. These case contrast starkly with the facts in Marc Christmas' case. The record demonstrates that both homicides occurred virtually at the same time with only minimal intervening time. Although Saunders may have had a matter of seconds to realize the impending death, the length of time is not sufficient to justify imposition of the HAC circumstance.

Appellant relies on the arguments presented in his initial brief as to sub-sections (B) and (C) of Argument III.

CONCLUSION

Because the trial court erred in admitting statements of appellant purportedly made to bailiffs, in overriding the jury's recommendation of a life sentence, and in improperly assessing the aggravating and mitigating circumstances the trial court committed error. Appellant's conviction should be reversed and this cause remanded for a new trial; in the alternative, the sentences of death should be vacated and sentences of life imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard A. Martell, Assistant Attorney General, the Capitol, Tallahassee, Florida 32301, by regular United States Mail this 5th day of May, 1993.

Teresa J. Sopp
Attorney for Appellant